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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 366

EARL C. COREY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 387

LAURENCE M. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (1 R.[1] 44 (1–27); C. Pet. A 1–35) is reported at 305 F. 2d 197.

[1] The designation "R." refers to the five-volume record of the trial in the district court and the appeal therefrom. Volume 1 of this record is bound to the back of the volume designated as Volume 2. The designation "R.M.", refers to the two-volume record relating to petitioners' motion for a new trial subsequent to the trial. The designations "C. Pet." and "S. Pet." respectively refer to the petitions for writs of certiorari filed in this Court by petitioners Corey and Smith.

JURISDICTION

The judgments of the court of appeals were entered on June 26, 1962 (1 R. 45–46; C. Pet. A 49–50). A petition for rehearing was denied on July 31, 1962 (1 R. 47; C. Pet. A 51). Petitioner Corey's petition for a writ of certiorari was filed on August 22, 1962, and that of petitioner Smith on August 29, 1962. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner Corey violated 18 U.S.C. 434 by secretly acquiring and retaining one-third interest in a grain storage warehouse in the Portland area while he as Director of the Portland office of the Commodity Stabilization Service, Department of Agriculture, exercised direct authority over grain storage in the area.

2. Whether the trial judge's participation in questioning petitioner Smith, and his comments, denied Smith a fair trial.

3. Whether the instruction on character testimony was proper.

4. Whether the district court properly denied motions for a new trial based on a claim that the prosecution was vitiated because originally based on inspection of petitioner Corey's tax returns under regulations alleged not to have been properly promulgated by the President.

STATUTES, TREASURY DECISION, AND EXECUTIVE ORDER

Act of June 29, 1948, c. 704, Sec. 15(a) (62 Stat. 1074, 15 U.S.C. 714m(a)):

> Whoever makes any statement knowing it to be false, or whoever willfully overvalues any

security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714–714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

18 U.S.C. 434:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

Internal Revenue Code of 1954 (26 U.S.C. 6103):

(a) Public record and inspection.

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B, C, and D of chapter 33, and subchapter B of chapter 37, shall constitute public records and shall be open to public ex-

amination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

* * * * * *

Internal Revenue Code of 1954 (26 U.S.C. 7807(a)):

> Until regulations are promulgated under any provision of this title which depends for its application upon the promulgation of regulations (or which is to be applied in such manner as may be prescribed by regulations) all instructions, rules or regulations which are in effect immediately prior to the enactment of this title shall, to the extent such instructions, rules, or regulations could be prescribed as regulations under authority of such provision, be applied as if promulgated as regulations under such provision.

Treasury Decision 4929 (4 F.R. 3778):

> SEC. 463C.0. *Introductory.*—Section 55(a)(1) of the Internal Revenue Code provides:
>
> > (1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.
>
> Section 55(a)(2) of the Internal Revenue Code provides:
>
> > (2) And all returns made under this chapter, subchapters A, B, and D of chap-

ter 2, subchapter B of chapter 3, chapters 4, * * * shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

* * * * *

Pursuant to the above-quoted provisions of law, it is hereby ordered that certain returns of individuals, partnerships, estates, trusts, corporations, associations, joint-stock companies, and insurance companies made pursuant to the requirements of the Internal Revenue Code shall be open to inspection in accordance and upon compliance with the following rules and regulations:

* * * * *

SEC. 463C.33. *Inspection by branch of Government other than Treasury Department.*— Except as provided in section 463C.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government, desires to inspect or to have some other officer or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury, be permitted upon written application to him by the head of such executive department or other Government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person it is desired shall inspect the return.

The information obtained under this section and section 463C.32 may be used as evidence in any proceeding, conducted by or before any department or establishment of the United States, or to which the United States is a party.

SEC. 463C.34. *Inspection by Government attorneys.*—Any return shall be open to inspection by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in section 463C.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States attorney.

* * * * *

HERBERT E. GASTON,
Acting Secretary of the Treasury.

Approved August 28, 1939;

FRANKLIN D. ROOSEVELT,
The White House.

[Filed with the Division of the Federal Register, August 29, 1939, 3:23 p.m.].

Executive Order No. 8230 (4 F.R. 3777):

EXECUTIVE ORDER

Authorizing the inspection of certain returns made under the Internal Revenue Code

By virtue of and pursuant to the authority vested in me by section 55(a) of the Internal Revenue Code, 53 Stat. 29, it is hereby ordered that the following returns made under the said Code shall be open to inspection in accordance

and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in the Treasury Decision relating to the inspection of such returns, approved by me this date:

Income (including income of personal holding companies and unjust enrichment income), excess-profits, capital stock, estate, and gift tax returns, and returns of employment tax on employers under subchapter C of chapter 9 of the Internal Revenue Code.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE, *August 28, 1939.*

[No. 8230]

STATEMENT

Petitioner Smith was charged in eight counts (1–8) of an indictment returned in the United States District Court for the District of Oregon with making false statements to the Commodity Credit Corporation (CCC), an instrumentality of the United States administered through the Commodity Stabilization Service (CSS), United States Department of Agriculture, in violation of 15 U.S.C. 714(m)(a). The statements in question were to the effect that he was the sole owner of the Three State warehouse, whereas the warehouse was in fact owned by a partnership consisting of Smith, petitioner Corey (who was a Director of the Portland office of CSS) and one Richards (2 R. 1 (1–6)). Count 9 charged conspiracy by the three to commit these substantive offenses (2 R. 1 (6–8)). In Count 10 Corey was charged with violating the conflict of interest statute, 18 U.S.C. 434, in that he acted as an officer and agent for the United

States, for the transaction of business with Three State, a business in which he had a pecuniary interest (2 R. 1 (8)). Count 11 charged a conspiracy by Smith, Corey, and Richards with respect to the offense under Count 10 (2 R. 1 (8–10)).

Petitioners were found guilty on all counts as charged (2 R. 11–12) and sentenced to concurrent terms of two years' imprisonment on each count (2 R. 22–23).

The record may be summarized as follows:

1. Corey was appointed as Director of the Portland Office of CSS in January 1955 (3 R. 39; 4 R. 466). His duties, as set out in the job-description, included the following:

> Interprets and adapts national programs to meet local and area conditions. These encompass * * * (3) disposal and acquisition policies such as when * * * commodities should be released or required * * *, (5) storage requirements, including methods of * * * storing * * * commodities owned by the corporation * * *. * * * [T]he Director determines those commodities * * * which should be reconcentrated, bought, sold, held in storage, and diverted for other uses or determines that these activities should not be activated because of effects of such actions on commodity markets or other segments of the agricultural economy of the area * * * [3 R. 42].

In the spring of 1956, Corey learned that a warehouse near Portland, Oregon, was available. After discussions with Richards and Smith, the three agreed to operate the warehouse, sharing costs and profits

equally. Pursuant to the agreement Smith and his wife leased the warehouse on April 10, 1956 (3 R. 74, 78, 82–83, 110–114, 121; 4 R. 377). Corey and Richards were, in effect, silent partners (3 R. 121; 4 R. 403, 507–510). Though Smith devoted a considerable amount of time to the operation, he received no salary nor any greater share of the proceeds (3 R. 140). On April 26, 1956, Smith, in applying for approval of warehouse facilities, made statements to the Commodity Credit Corporation indicating that he was the sole owner of the warehouse company and made statements to the same effect in the 7 additional documents cited in Counts 2–8 of the indictment (3 R. 163–168).

In July 1956, Richards paid Smith $30,000 as his share of the estimated costs (3 R. 120). Corey delivered his promissory note for $30,000 to Smith (3 R. 120–121). This note was later paid by deductions from earnings payable to Corey (3 R. 124). In August 1956, petitioners and Richards executed a written partnership agreement (3 R. 120, 274) in confirmation of their original oral agreement (4 R. 274, 379). The business consisted solely of storage of grain for CCC. It operated at a loss during the first year. Thereafter a profit was realized each year and divided equally among petitioners and Richards. The profits were in the approximate aggregate amount of $250,000 during the three years in which Corey participated (3 R. 123–124, 249).

On January 10, 1957, the Chief of the Field Operation Division of the Portland Commodity office of CSS directed a memorandum to Corey, suggesting

that priority be given to loading wheat out of a number of facilities classified as emergency facilities, including the Three States warehouse, but the recommendation was not followed (3 R. 172–175).

An independent audit of the Department of Agriculture in March 1957 resulted in a recommendation by the auditors to Corey that, since cost of storage in ships of the federal "mothball" fleet was one-twelfth of that of private storage, unloading of the ships should be discontinued. Corey declined to stop the unloading, citing export demands and stating that inventory management was his own responsibility and not that of the auditors (3 R. 215–219).

In July 1958, Corey requested the Director of the Minneapolis Commodity Office to ship wheat to the Three States company (3 R. 56, 189–194). Corey also participated in telephone conferences on many occasions relating to the movement of grain (3 R. 67). Corey later admitted to a Department of Agriculture investigator that he had responsibilities with respect to grain storage. This admission was made after a telephone call to Corey, made during the interview, by a warehouseman inquiring as to the availability of grain for his warehouse (3 R. 250–253).

On May 1, 1959, the business was incorporated (3 R. 275). Smith, his wife, and an attorney were named the directors and officers, and the partners received equal stock ownership (3 R. 118, 275). Shortly thereafter, Corey sold his stock to the corporation for $30,000 (3 R. 124, 275–276).

2. During the pendency of their appeals, petitioners moved in the district court for a new trial on the

ground of newly discovered evidence, alleging that the government had learned of Corey's interest in Three State by examination of his federal income-tax returns (1 R.M. 1–2, 8–9). The claim was that this fact invalidated the prosecution. The government replied, *inter alia*, that the examination was authorized upon the written request of the head of a government department, *i.e.*, the Department of Agriculture, pursuant to the procedure provided in 26 U.S.C. 6103(a), and the regulations made applicable by 26 U.S.C. 7807 (2 R.M., Oct. 17, 1961, pp. 6–7).

The motions for a new trial were denied (1 R.M. 11) and appeals from the order of denial were consolidated with the pending appeal. The court of appeals affirmed the denial of a new trial (1 R. 44 (5–9), 45; C. Pet. A 6–11, 49) and the judgments of conviction (1 R. 44 (9–27), 46; C. Pet. A 11–35, 50).

ARGUMENT

1. There is no merit to the contention (C. Pet. 5–13, S. Pet. 29) that the conflict of interest statute, 18 U.S.C. 434, does not apply to this case or that, if interpreted to cover these facts, the statute is void for vagueness.[2] Petitioner Corey, the Director of the Portland office of the Commodity Stabilization Service, was indisputably a secret partner with a one-

[2] Since the sentence against Smith is supported by the false statement counts, this contention does not affect the judgment against him. Corey raises as a question but does not argue the sufficiency of the evidence to support his conviction for conspiring to make false statements. However his sentence on that count runs concurrently with the sentence on the substantive count.

third interest in the Three State warehouse, and a beneficiary of the substantial profits resulting from the storage there of government grain by the Commodity Stabilization Service. He was no far-distant government official with duties unrelated to grain and its storage. He was the Director of the office which executed the grain storage contracts. Although he was authorized to delegate the negotiation and execution of the storage contracts, and did so, the departmental order authorizing such delegation nevertheless reserved to the Director the responsibility for contract approvals, even if it were further delegated (1 R. 44 (21), see Pet. A27). In at least one instance, Corey himself requested the director of the Minneapolis office of CSS to ship grain to the Three State warehouse. Corey participated in telephone conferences on many occasions relating to movement of grain. On one occasion, witnessed by a person who was later a government witness, a telephone inquiry by a warehouseman as to the availability of grain for his warehouse clearly came to Corey. Furthermore, Corey's duties included interpretation and adaptation of national programs to meet local conditions including, *inter alia*, methods of storing grain. Corey was the official to whom the memorandum of the Chief of the Field Operation Division of the Portland office was directed, recommending, without success, that priority be given to loading wheat *out of* a number of

[3] We thus disagree with petitioner Corey's assertion in his Statement (Pet. 7) that "the work in connection with the execution of grain storage agreements and the movement of grain in and out of the warehouses" was "all" performed by others than Corey.

emergency facilities, including the Three State warehouse. And, again, Corey was the official to whom Department of Agriculture auditors directed the unheeded recommendation that the cheaper storage facilities of the "mothball" fleet be used.[4] Finally, as the court below notes, since directors of the commodity offices of CSS assisted in the negotiation of the uniform storage rates to be paid warehousemen, "the profits earned by each warehouse were in part determined by the director [Corey]" (1 R. 44(21); 1 C. Pet. A 27).

The activities here clearly fall within the intended reach of the statute, whatever peripheral problems may be presented by other cases. Corey could have had no doubt that his one-third interest in a warehouse (which he kept secret) was not compatible with the singleness of purpose required of him in relation to his government office. As this Court said in *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 549-550:[5]

> [A]n impairment of impartial judgment can occur in even the most well-meaning men when

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[4] The statute *(supra*, p. 3) penalizes not only the participant in a business entity who "acts" as an officer or agent of the United States, but also a participant who "is employed" as a government officer or agent "for" the transaction of business with such business entity. *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 552. Accordingly, the instruction requested by petitioner Corey (C. Pet. 7-8), which conditioned a violation upon the jury's finding that Corey actually "transacted" business, was properly rejected. The government could be damaged as effectively by his failure to act when his employment called for action, as by the affirmative acts already cited.

[5] In the light of this Court's *Mississippi Valley* decision, petitioners are in no position to rely on the prior study by the Association of the Bar of the City of New York *Conflict of*

> their personal economic interests are affected by the business they transact on behalf of the Government. * * * [The statute] attempts to prevent honest government agents from succumbing to temptation by *making it illegal for them to enter into relationships* which are fraught with temptation. [Emphasis supplied.]

2. Petitioner Smith contends that the trial court by its questions and comments denied him a fair trial. The court of appeals stated (1 R. 44 (12); S. Pet. A 16):

> A review of the entire record convinces us that the judge did not participate in the proceedings in such a way as to deprive appellants of a fair trial by jury.

Petitioner's claim cannot be judged by taking a few isolated instances out of their setting. In the attempt to clarify and expedite a lengthy trial, the trial judge did occasionally interrupt the questioning by the defense and by government (*e.g.*, 3 R. 39, 97, 101, 254–258) but, considering the narrow question involved, curtailment of inquiry into irrelevant matters was entirely proper.

Petitioner Smith has set forth in his appendix C (S. Pet. A 40–52) the remarks of the judge of which he complains. On the face of it, it is evident that

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Interest and Federal Services (Harvard University Press, 1960) and the prior opinion of the Attorney General in *Nomination of Neil H. McElroy*, Hearing before the Senate Committee on Armed Forces, 85th Cong., 1st Sess., pp. 12–14. In any event, as we have shown, Corey's official duties in relation to grain storage contracts were not remote and he did not step aside from any activity that might involve Three State.

petitioner is, for the most part, unduly attempting to magnify a minor incident, or to read prejudice into a correct ruling. For example, the initial claim of prejudice (S. Pet. 8) is based on the fact that when petitioner's counsel in his opening statement was broadly discussing the merits of the government commodity program, the court pointed out that this would be irrelevant, since the issue was whether Smith had made false statements in the documents presented to the government, and not whether the storage contract obtained under these documents was, or was not, beneficial to the government (3 R. 12–14; S. Pet. A 40–41).[6] The allegation that by asking whether the jury heard an answer of Richards, the judge "emphasized" a "crucial" question (S. Pet. 9, see 3 R. 110; S. Pet. A 41–42) ignores the fact, indicated in the record, that this trial was held in a courtroom in which the passage of trucks could seriously interfere with hearing (3 R. 252–253). Petitioner made no objection at the time. Petitioner Smith complains (S. Pet. 9) that the judge on his own motion restricted cross-examination of Richards and advised the jury that Richards was friendly to Smith. The transcript shows merely an inquiry by the judge as to whether Richards was still an employee of petitioner Smith and, upon Richards' affirmative reply, an instruction to petitioner's counsel to refrain from further leading questions of a witness who was obviously friendly (3 R. 131; S. Pet. A 42).

[6] Another of the rulings of which petitioner Smith now complains involves the same point (4 R. 335–336; S. Pet. A 46).

The only incident which petitioner discusses in detail in his argument (S. Pet. 18–19) is the cross-examination of Smith's attorney Phelps, a matter discussed in the opinion below (S. Pet. A 11–13). The trial judge was understandably surprised at Phelps' statement that the partnership agreement gave Smith sole ownership, despite the express language of the contract to the contrary. It was in the course of this disclosure of the strange disparity between the partnership agreement and the attorney's characterization of it that the judge inquired about the attorney's experience as a lawyer (4 R. 421–423; S. Pet. A 49–50). However, the judge immediately explained to the jury that—

> this evidence is not to determine whether [petitioner Smith] got good advice or not. I might tell you it is just to determine whether Mr. Smith acted in good faith in reliance on the advice given him by a lawyer. You do not have to determine whether Mr. Phelps is a good lawyer or not. You just have to determine whether Mr. Smith acted on his advice. [4 R. 423; 5 Pet. A 50–51.]

And see the further, ultimate instructions at 5 R. 684–686, 690, 709–710, 733–734; S. Pet. A 12, 14, fn. 8, A 52). As the court of appeals noted (1 R. 44 (10); S. Pet. A 13), the colloquy was perhaps unfortunate. But it cannot have prejudiced Smith, since he himself testified that Three State was a partnership (4 R. 377, 379).

Petitioner made no objection at the trial to most of the matters which he now claims deprived him of a fair trial, including the comment as to Phelps.

The present attempt to attribute a conviction overwhelmingly supported by the evidence to the judge's alleged hostility is unwarranted.

3. The instruction given by the district court on character evidence was as follows (5 R. 689; emphasis supplied):

> Mr. Smith has presented evidence of his good character and as an honest and law-abiding citizen. This is a fact for you to consider with other facts concerning Mr. Smith because *that testimony, like other testimony, may generate in your mind a reasonable doubt* as to the guilt of Mr. Smith, *justifying an acquittal, since the Jury may think it improbable that a person of good character would commit the crimes* with which he has been charged. However, if, after weighing all of the evidence, you are convinced beyond a reasonable doubt that Mr. Smith is guilty of the crimes charged against him in one or more counts, it will be your duty to find him guilty, notwithstanding the fact that he is or was a person of good character.

Petitioner Smith requested the following instruction (2 R. 34(VI); emphasis supplied):

> * * * The defendant L. M. Smith has produced evidence of his good character as an honest and law-abiding citizen. This evidence has not been rebutted or contradicted.
>
> Mr. Smith's good character is relevant in determining whether it is probable that he is guilty as charged, and you must give it due weight and consideration in your deliberations.
>
> Testimony showing a character for honesty and integrity *may alone be sufficient to create a*

> *reasonable doubt* and require a verdict of not guilty, although without it the evidence might otherwise be convincing.

While the trial judge did not, as petitioner requested, explicitly say that character evidence "alone" might create a reasonable doubt, his instruction, fairly read, is to that effect. He told the jury that the character testimony "may generate in your mind a reasonable doubt," and suggested that the jury might think it improbable that a person of good character would commit the crimes charged.

This Court, in *Edgington* v. *United States*, 164 U.S. 361, 366, struck down an instruction which permitted the jury to consider character evidence only if other testimony itself created a reasonable doubt. It was in that context that the Court stated that—

> good character, when considered in connection with other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

The present instruction, we submit, meets the rule announced in *Edgington*. Nor is there any conflict with the decisions relied upon by petitioner.[7] A similar at-

[7] In *Miller* v. *United States*, 120 F. 2d 968, 971-972 (C.A. 10), the instruction limited the jury's consideration of character evidence to the question of whether government witnesses committed perjury or were mistaken. In *United States* v. *Donnelly*, 179 F. 2d 227, 233 (C.A. 7), the defective instruction required consideration of the character testimony "with" other testimony and did not say that character evidence may raise a reasonable doubt. In *Villaroman* v. *United States*, 184 F. 2d 261,

tempt to secure review on the basis of an alleged conflict of circuits on the necessity of using the word "alone" was rejected by this Court in *United States* v. *Passero*, 290 F. 2d 238 (C.A. 2), certiorari denied, 368 U.S. 819 (see the petition in No. 115, O.T. 1961); see also *Moore* v. *United States*, 254 F. 2d 213 (C.A. 5), certiorari denied, 357 U.S. 926; *Poliafico* v. *United States*, 237 F. 2d 97 (C.A. 6), certiorari denied, 352 U.S. 1025 involving more significant (though still slight) differences in instructions as to the weight to be given to character evidence.

4. In their motion for a new trial petitioners claimed that the prosecution was invalid as "fruits of the poisonous tree" because it stemmed from an allegedly unauthorized inspection of petitioner Corey's income tax returns. The claimed new evidence could, if material, have been discovered before trial.[8] Moreover, even if the regulations apparently

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262–263 (C.A.D.C.), the court in reversing on other grounds suggested that the defendant's proposed instruction should be given in a new trial but did not negate the proposition that other language, such as that here, would fully suffice.

[8] With respect to petitioners' contention that the government inspection of Corey's tax return was a matter of newly discovered evidence (in excuse for the belated raising of the issue), it is undisputed that petitioner Corey, before the trial, suspected that such inspection had been made and made inquiry about it when a government investigator interviewed him. The investigator did not answer the question as to whether the returns had been examined but merely stated that the investigation of Corey was not an income tax matter (3 R. 249). In the face of the investigator's failure to answer the question, petitioners were required to exercise diligence in exploring the issue before trial, and, in any event, to explore it during the trial when the whole incident of Corey's question as to such inspection reappeared in the testimony of the investi-

authorizing the inspection were, as petitioners claim, not properly promulgated, inspection by the Department of Agriculture was not the kind of misconduct which would require eliminating all the evidence uncovered by the subsequent investigation. A technical defect in the regulations is not the equivalent of wire-tapping or illegal search. Moreover, the nexus between the inspection of the returns and the trial evidence is too attenuated to justify exclusion. See *Nardone* v. *United States*, 308 U.S. 338, 341.

In any event, the contention is without merit. Petitioners do not deny that the government's request for inspection of Corey's tax returns was in full compliance with the regulations (1 R. 44(9); C. Pet. A 11), but merely assert that the regulations were invalid as not having been "promulgated" by the President. The applicable regulations were those under Section 55(a) of the Internal Revenue Code of 1939, made applicable, until new regulations could be issued, by Section 7807(a) of the 1954 Code. Under the former Code, the President issued an execu-

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gator. The investigator was not cross-examined by petitioners concerning the inspection of returns. Petitioners were not entitled to await the outcome of the trial and, after an adverse result, rely on a reply to interrogatories in a subsequent civil suit as basis for a new trial in the criminal proceeding. *United States* v. *Giglio*, 263 F. 2d 410, 413 (C.A. 2), certiorari denied, 361 U.S. 820; *United States* v. *Kampas*, 189 F. Supp. 720, 722 (W.D. Pa.). The fact that the government afterward, in the civil case, was reluctant to spread on the record the detail of its request for the income tax returns, involving other matters and persons, is not relevant to, and can not shore up, petitioners' contention that they could not, by reasonable diligence, have adduced the evidence upon which they later sought a new trial.

tive order by which it was "hereby ordered" that income tax returns, *inter alia*, "shall be open to inspection" upon compliance with the regulations "prescribed" by the Secretary of the Treasury and "approved by me this date." This was both an approval under subsection (1) and a promulgation under subsection (2). The definition of "promulgate" is "to issue or give out (a law) by way of putting into execution", or "to announce officially" (*Webster's Third International Dictionary* (1961)). That clearly was done here.

Petitioners do not suggest what else the President could have done to "promulgate" the regulations. They merely say that the instant regulations "are a product of the Secretary of the Treasury" (S. Pet. 24). If this is a contention that the statute requires the President to set up a separate organization of his own and refrain from promulgating regulations initially prepared by any other person or department of the government, it finds no support in either the statute or the legislative history, much less in common sense.[9]

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[9] Petitioners' citations to the Congressional Record (45 Cong. Rec. 4136, 77 Cong. Rec. 5694–5695, 5859–5860, and 78 Cong. Rec. 2514–2516) prove, upon examination, to be of no relevance to the issue of *how* the President's authorization of inspection of returns is to be promulgated, but only to the issue of *whether* the President should be given such authority. Nothing appears in the cited debates even remotely addressed to the question of what shall constitute promulgation by the President, much less anything supporting petitioners' assumption that such promulgation of rules would not be sufficiently effected by the procedure here employed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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